No. 89-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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1. The Solicitor General, departing sharply from the position taken by the government below, agrees that "plenary appellate review of an order relating to a consent decree is proper when the order is one to which no consent has in fact been given." Br. in Opp. 10. He nonetheless argues that the Court of Appeals lacked jurisdiction in this case because, in his view, the IBT "consented to the orders entered by the district court and cannot now be heard to impeach them." *Id.* at 8.

The Solicitor General does not mean quite what those words say, for there is no doubt that the IBT vigorously contested the orders at issue and never consented to them. As he sees it, however, a reasonable interpretation of a consent decree—even if genuinely disputed and hotly contested—does not give rise to an "unconsented-to" (*id.* at 10) reviewable order, because agreement to the underlying decree necessarily implies consent to reasonable interpretations of the decree. He accordingly argues in this case that the IBT "consented to the district court's [interpretive] orders (and thereby waived appellate review of the merits of those orders) by its agreement to the [original] consent decree." *Id.* at 11.

Under the Solicitor General's circular reasoning, a court of appeals has no power to decide whether the interpretation of a consent decree is *correct* until it first determines as a "jurisdictional fact" (*id.* at 15) that the interpretation is *incorrect*. Only then, in his view, can the court of appeals properly find that the interpretation was "unconsented-to" and therefore reviewable. But that puts the cart before the horse. The issue at the jurisdictional stage is whether there is a genuine dispute over the district court's interpretation. The correctness of the interpretation is for consideration on the merits. By inverting the inquiry—in effect requiring a court of appeals to *dispose* of the merits before it can *reach* the merits—the Solicitor General would erect an unprecedented and unworkable obstacle to the exercise of appellate jurisdiction.

Not one of the cases on which the Solicitor General relies supports his bizarre theory. He states that "the courts of appeals frequently dismiss appeals for lack of jurisdiction . . . when, as here, the only question on appeal is whether an order is within the scope of a consent decree." *Id.* at 13. But the decisions he cites involved challenges, not to an interpretation of a consent decree, but to the decree itself. Thus, appeals were dismissed

where parties sought to set aside a consent decree, *Swift & Co. v. United States*, 276 U.S. 311 (1928), to relitigate an issue resolved in a consent judgment, *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885), or to challenge on appeal an order stipulated or agreed upon in the court below, *United States v. Babbit*, 104 U.S. 767 (1881); *Pacific R.R. v. Ketchum*, 101 U.S. 289 (1879); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986); *White v. Commissioner*, 776 F.2d 976 (11th Cir. 1985); *Haitian Refugee Center v. Civiletti*, 614 F.2d 92 (5th Cir. 1980).

The IBT has never challenged the consent order in this case. On the contrary, it seeks only to vindicate the terms of that order. Its argument—the merits of which the Court of Appeals refused to hear—is that the district court's purported interpretation of the consent order is incompatible with the terms of the order and with the parties' purposes. Until the decision below, no court had doubted that a district court's genuinely disputed interpretation of a consent decree was reviewable on appeal. See the cases cited at Pet. 14-16. Indeed, as the D.C. Circuit reiterated only a few weeks ago, it has "repeatedly held that the construction of a consent decree . . . is subject to *de novo* appellate review." *United States v. Western Electric Co.*, No. 87-5388, slip op. at 23 (D.C. Cir. Apr. 3, 1990) (WESTLAW, CTADC database).

The rule is straightforward and easy to apply: while a party's consent to an order bars an appeal of that order, it does not bar an appeal of a contested interpretation of the order. The correctness of the interpretation goes to the merits of the district court's decision, not to the jurisdiction of the court of appeals. The Solicitor General's theory would make every such appeal jurisdictionally top-heavy, requiring the court of appeals to inquire dispositively into the merits in order to determine

its jurisdiction to consider the merits. That approach would give rise to a new category of motion practice in the courts of appeals, imposing on those courts threshold burdens that are best handled after full briefing and argument on the merits. It would also have the undesirable practical effect of insulating from plenary appellate review many district court orders, like the ones appealed from here, whose fidelity to the terms of an underlying consent decree is subject to legitimate question.

If there is to be so drastic a change in the way courts of appeals handle the review of such orders, the change should be made, not by the Second Circuit in an unexplained order of dismissal or by the Solicitor General straining to defend that dismissal, but only by this Court after full consideration of the consequences.

2. If there were reason to doubt the genuineness of a dispute over an order interpreting a consent decree—if, in other words, the appellant has no colorable argument on the merits—one might fairly conclude that the appeal should be dismissed as a mere pretext for challenging the underlying decree. Even that principle must be applied with caution, because every district court interpretation purports to apply the plain terms of a consent decree, and the prevailing party will always insist, as the Solicitor General does here, that the contested order "merely reiterated the unambiguous terms of the decree." Br. in Opp. 11. The focus should be not on the strength of the prevailing party's belief in his cause but on the genuineness of the controversy. If the appeal presents a nonfrivolous issue, it should be decided on the merits.

The decision below cannot be squared with such an approach. First, contrary to the Solicitor General's assumption, it is implausible to suppose that the Court of Appeals based its dismissal orders on a consideration of the merits. When the government moved to dismiss the IBT's appeals, long before briefs on the merits were to be filed, it made three arguments: (1) the orders appealed

from were non-final; (2) the orders could not be reviewed under the collateral order doctrine; (3) the Court of Appeals should in any event decline jurisdiction by analogy to this Court's summary dismissal of appeals for lack of a substantial federal question. See Gov't C.A. Mem., Nov. 22, 1989, at 5-10; Gov't C.A. Mem., Dec. 1, 1989, at 6-10. It was only in connection with the third claim, essentially an appellate afterthought, that the government used the language to which the Solicitor General points in support of his assertion that "waiver underlies the court of appeals' dismissal." Br. in Opp. 8. Divining the basis of the Second Circuit's decision from the arguments presented to it is at best a speculative exercise. To conclude, as the Solicitor General has, that the Second Circuit based its decision on a subsidiary aspect of the least prominent argument urged upon it exceeds any reasonable limits on such speculation.

Second, while the Solicitor General understandably believes that the government has the better of the argument on the merits of the district court's interpretation, not even he goes so far as to suggest that the IBT's interpretive position is frivolous. Although the merits were never briefed before the Court of Appeals, even a cursory review of the issues makes clear that the IBT's claims are both genuine and substantial.

For example, the Consent Order, by its terms, authorizes the Election Officer to "supervise the IBT election described above to be conducted in 1991." Pet. App. 41a. The Solicitor General argues that the phrase "described above" embraces not only the 1991 International election but also a series of local delegate elections to be conducted beginning in 1990. Br. in Opp. 11. He considers the text of the decree "unambiguous" in this respect. *Id.* But the relevant language uses the word "election," not "elections," and it contains the restrictive clause "to be conducted in 1991." The more natural reading of the text is that it confers supervisory powers on the Election

Officer *only* as to the 1991 International election and *not* as to the 1990 delegate elections that are also "described above." If the clause means what the Solicitor General believes it means, there would have been no purpose in adding the limiting phrase "to be conducted in 1991."

In support of its textual argument, the IBT submitted to the district court sworn affidavits from the primary negotiators of the Consent Order attesting to the parties' intention not to consent to the Election Officer's supervision of delegate elections at the union local level. These affidavits included prior drafts of the Consent Order showing that all proposals that would have conferred such powers on the Election Officer had been intentionally omitted from the final version of the Consent Order. See Pet. 6-7 & n.7.

Similarly, the IBT agreed in the Consent Order that the "Administrator shall have the authority to distribute materials at reasonable times to the membership of the [union] about the Administrator's activities" and that he "shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations Officer and Election Officer." Pet. App. 42a. No plain reading of this language can lead to the conclusion that the IBT consented to devote substantial portions of its magazine to the publication of the district court's opinions. The Solicitor General contends, however, that the publication order was issued in response to a request by the Administrator and thus falls "well within" the IBT's agreed-upon obligation to publish the Administrator's reports on the activities of the court officers. Br. in Opp. 4-5. The record refutes the premise of that argument.

The order requiring publication of the court's opinions specifies that it arose from a "hearing . . . held to clarify the orders of this Court made regarding the publication of this Court's opinions and other related matters (the 'publication hearing')." Pet. App. 22a. The transcript

of the so-called "publication hearing" contains the following statement of the Independent Administrator to the district judge: "In court here on the 13th you indicated you wanted your opinions published in full. I have not been aware prior to that time that that was your . . . Honor's wish." Tr. Nov. 15, 1989, at 2. Obviously the publication order was not, as the Solicitor General contends, a response to an initiative of the Administrator, since by the Administrator's own admission, it came as a surprise to him.

This fact is confirmed by the district court's acknowledgment in open court on November 13 that the Administrator's application concerning the publication schedule of the IBT magazine did not include any request that the IBT publish the court's opinions. Tr. Nov. 13, 1989, at 29. Unprompted by the Administrator, the district judge *sua sponte* ordered the IBT to distribute the court's opinions on a monthly basis (*id.* at 40):

> What I'm concerned about is that this court's proceedings and how it arrives at its decision be made known to every member of this class, and I insist upon it. And so I do not reserve on this point at all. The membership will be given distributions every month, including my dispositions, not characterizations of my opinions, but the opinions in haec verba. That's an order.

The record therefore reveals that the publication order has no anchor at all in the text of the Consent Order. The Solicitor General's suggestion that it arose from a request by the Administrator, submitted "simultaneously" with his application concerning the publication schedule of the IBT magazine (Br. in Opp. 4), is flatly wrong.

We believe that the IBT has by far the better of the argument on these interpretive issues. But one need not endorse the IBT's view of the decree to recognize that its claims are substantial ones of which it was entitled

to appellate review on the merits. Claims such as these should not be treated as falling outside the scope of appellate review simply because they challenge district court rulings on the ground that they exceed the scope of a consent decree.

3. The petition presents an important issue of principle, not a "fact-bound dispute over the meaning of [the consent] agreement." Br. in Opp. 9. The Solicitor General obviously finds it more comfortable to embrace the merits of the district court's interpretation than to defend the appropriateness of the Court of Appeals' dismissal of the IBT's appeals. His solution is to try converting the case into a routine disagreement over how best to read a consent decree.

Had the Court of Appeals addressed the merits of the appeals, perhaps all that would remain is a "fact-bound" dispute unworthy of this Court's attention. But the Court of Appeals' dismissal of the appeals was not a decision on the merits; it was a *refusal* to decide the merits. At this stage, therefore, the question is not whether this Court should review the correctness of the district court's orders but whether the IBT is entitled to such review in the Court of Appeals, whose jurisdiction is mandatory, not discretionary.

This Court should grant review to consider the circumstances under which a party may obtain appellate review of a purported interpretation of a consent decree. The Second Circuit's disposition, even as explicated by the Solicitor General, would expose such a party to the risk that it may be forced, on pain of contempt, to take difficult and costly actions, to which it does not believe it has consented, without a meaningful opportunity for appellate review. That novel principle warrants plenary consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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